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No. ____

IN THE
Supreme Court of the United States

WILLIAM TEJEDA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rebuttable presumption of prejudice resulting from improper contact or tampering with jurors, set forth in *Remmer v. United States*, 347 U.S. 227 (1954), remains good law.

2. Whether in sentencing an individual defendant a district court may rely on the permissive presumption of reasonableness afforded any sentence within the applicable guidelines range for the offense of conviction and thereby disregard and/or deemphasize one or more of the 18 U.S.C. § 3553(a) factors—here, the factor of amenability to rehabilitation.

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PETITION FOR CERTIORARI

Petitioner William Tejeda respectfully petitions for a writ of certiorari to review the judgment against him of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 481 F.3d 44 (1st Cir. 2007). The district court issued no opinion on the questions presented. The relevant pages of the sentencing transcript appear at App. 30a-33a.

JURISDICTION

The court of appeals entered its judgment on April 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. Title 18 of the United States Code, Section 3553(a) provides:
(a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph

(2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

This is a case in which the defendant William Tejeda's grandfather made a threatening throat-slitting gesture toward the jury on the first day of evidence in a three week trial. The gesture was seen by two jurors, one of whom convened a meeting of all the jurors to discuss her fears and concerns regarding the gesture, and then brought the gesture to the attention of the district court. Mr. Tejeda moved for a mistrial, but his motion was denied. Ten full trial days later

Mr. Tejeda was convicted. The district court later sentenced Mr. Tejeda to 20 years in prison because of the "nature of the offense," explicitly disregarding and/or deemphasizing the fact that Mr. Tejeda (who had no prior criminal record and no prior arrests, who had a strong, supportive family, who was an active and affectionate father of two, and who had been gainfully and lawfully employed for his entire adult life) was, according to every study that has been done, a poster-child for amenability to rehabilitation.

The Court of Appeals for the First Circuit (the "First Circuit") affirmed Mr. Tejeda's conviction and sentence, holding, in accord with a minority of circuits, that the presumption of prejudice rule for improper jury contact and jury tampering announced by this Court in *Remmer v. United States*, 347 U.S. 227 (1954), did not apply. The First Circuit further held that Mr. Tejeda's guidelines sentence was reasonable.

Certiorari should be granted here because this case presents a perfect opportunity for this Court to address two issues of general applicability and import. First, the case, which is very close on its facts to *Remmer*, would permit the Court to resolve the split in the circuits regarding whether the *Remmer* presumption of prejudice remains good law. Second, the case would allow the Court to clarify whether the permissible presumption of reasonableness afforded all guideline sentences, permits district courts to disregard or deemphasize 18 U.S.C. § 3553(a) factors in sentencing an individual defendant as to whom one or more of those factors may be peculiarly applicable.

A. District Court Proceedings

Mr. Tejeda was charged in a one-count indictment, along with five co-defendants, with conspiracy to distribute, and to possess with intent to distribute, cocaine base, also known as "crack cocaine." App. 2a. During the morning recess on the

second day of trial testimony, the district court learned that two jurors had observed a man sitting in the back of the courtroom make a threatening "throat-slitting gesture" during the first day of trial. App. 5a. The individual observed to have made the gesture was Mr. Tejeda's grandfather. App. 5a. Mr. Tejeda immediately moved for a mistrial. App. 6a. The district court took the motion under advisement, and ordered both of Mr. Tejeda's grandparents, who had been seated together in the back of the courtroom, to immediately leave the courthouse and the surrounding area and not return. App. 5a. When the jurors were brought back in to the courtroom, they were instructed that a matter had been conveyed to the court and that the court had "taken care of it completely." The district court further stated: "Put it out of your mind. It has nothing to do with this case." App. 6a. Testimony resumed.

Mr. Tejeda then formalized his motion for mistrial in writing. App. 6a. The court denied the motion, but agreed, on the third day of evidence, to *voir dire* the juror who had reported observing the gesture—Juror No. 11, the jury foreperson. App. 9a. During the *voir dire*, the district court learned that Juror No. 11 had discussed the gesture with *all* of the other members of the jury. App. 7a.

The district court also learned that Juror No. 11's decision to discuss the throat-slitting gesture with her fellow jurors and ultimately to report it to the courtroom clerk were prompted by testimony linking the person who made the gesture—Mr. Tejeda's grandfather—with a red van that, according to the government's first witness, was central to the charged drug conspiracy, and which was later inextricably linked to Mr. Tejeda. App. 6a-7a. When Juror No. 11 observed the throat-slitting gesture, she found it "concerning," but said nothing. App. 7a. The next day of evidence, Juror No. 11's concerns were heightened when the government's first witness, who was still on the witness stand, pointed to Mr. Tejeda's

grandfather and testified that he had seen him in or around the red van while it was parked in front of the courthouse. Juror No. 11 reported that this testimony made her "really feel uncomfortable," and prompted her to report what she had seen to the other jurors. App. 6a-7a. Juror No. 11 further reported that her conversation with her co-jurors confirmed that at least one other juror had observed the throat-slitting gesture, and that the gesture had been a "very deliberate thing." When asked by the court whether the matter continued to concern her, Juror No. 11 responded that it was "disconcerting" to know that people in the courtroom know the jurors' names, and that "as a person you fear for yourself and your family." App. 7a.

At the conclusion of the *voir dire* of Juror No. 11, Mr. Tejeda renewed his motion for a mistrial. The district court then conducted *voir dire* of the other juror who had observed the gesture (Juror No. 6), and once again denied Mr. Tejeda's motion. App. 7a.

The next day, the district court conducted individual *voir dire* of the remaining twelve jurors. In response to the court's inquiries, at least five jurors gave specific answers indicating that they shared fears and concerns like those that had already been expressed by the foreperson, Juror No. 11:

> *Juror No. 30* – This juror stated that the gesture "puts pressure on the jury."
>
> *Juror No. 14* – This juror was left with the impression that the throat-slitting gesture had been directed *at* Juror No. 11. When asked by the court what she made of the matter, Juror No. 14 stated that she was concerned "most of all [with] the safety issue."
>
> *Juror No. 22* – This juror reported that Juror No. 11 said that the throat-slitting gesture had "looked like a deliberate motion."

Juror No. 1 – This juror stated that the individuals who observed the throat-slitting gesture said that it had been "very disconcerting." She assumed that the gesture had been made by a person known by one of the individual defendants.

Juror No. 9 – This juror reported that Juror No. 11 had explained that she had seen a person in Court make a gesture "to her." After hearing Juror No. 11's explanation, Juror No. 9 told her that she "must" report it. He also stated that he was "sure" that the incident was "unsettling" for Juror No. 11.

App. 7a-8a.

Following the jury-wide *voir dire*, Mr. Tejeda renewed his motion for a mistrial, arguing that the jurors' *voir dire* responses confirmed that his right to a fair trial had been irrevocably compromised. App. 8a. Mr. Tejeda's motion was taken under advisement, and ultimately denied. Trial continued, and Mr. Tejeda was convicted. App. 8a.

At sentencing, Mr. Tejeda's lead argument was that his unique history—no criminal record, no prior arrests, gainfully and legally employed throughout his adult life, dedicated father of two young children, part of a strong supportive family—made the likelihood of his rehabilitation particularly high, and the likelihood of his recidivism particularly low. Accordingly, he maintained that a sentence within his otherwise applicable guidelines range would be unreasonable, and greater than necessary to satisfy the purposes of punishment. Mr. Tejeda's argument was supported by studies done by the Sentencing Commission. The government did not even attempt to rebut Mr. Tejeda's position concerning his high amenability for rehabilitation. Instead, it simply asserted that Mr. Tejeda should receive a sentence at the low end of the applicable guidelines range (19 years and 7 months).

The district court sentenced Mr. Tejeda to 20 years imprisonment, above even the sentence recommended by the government. App. 31a. While the district court provided little explanation for its sentence, it did make the following statement with respect to Mr. Tejeda's argument that sentencing him within the guidelines range would insufficiently take into account his extraordinary potential for rehabilitation:

> "But your attorney is right to this extent. This sentence does not take into account rehabilitation. That's not quite right. It takes it into account, but it does not emphasize rehabilitation due to the nature of the offense." App. 32a.

This comment, while ambiguous in and of itself, is clarified by a comment made by the district court just a few days earlier in sentencing one of Mr. Tejeda's co-defendants, Christopher Custer, to a 25 year sentence:

> "Having said all that, the omission of any reference to rehabilitation is, sadly, intentional. A sentence of 25 years on an individual of your age, sir, holds out no particular prospect of rehabilitation. *And we kid ourselves if we think that sentences this long as advised by congress and the sentencing commission will in fact rehabilitate people who are sent away for such a period.*" App. 36a (emphasis added).

B. Mr. Tejeda's Appeal

On appeal, Mr. Tejeda argued that the district court's handling of the improper jury contact and jury tampering issue which arose out of the jurors' reaction to Mr. Tejeda's grandfather's throat-slitting gesture, should be analyzed under the framework set out by this Court in *Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*). In *Remmer I*, this Court held:

> "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a

> trial about the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial* . . . . The presumption is not conclusive, but the *burden rests heavily upon the Government* to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* at 229 (emphasis added).

Mr. Tejeda argued that because multiple jurors expressed concern and/or fear as a result of the throat-slitting gesture, the government could not overcome the heavy burden of proving harmlessness.

As to sentencing, Mr. Tejeda argued that the district court's sentencing was unreasonable as a matter of law because, in failing to give due consideration to the 18 U.S.C. § 3553(a) factor of rehabilitation in deference to the "nature of the offense," the district court abdicated its statutory obligation to consider all § 3553(a) factors individually in crafting Mr. Tejeda's sentence.

C. First Circuit's Decision

The First Circuit began its analysis by noting that "[t]here is an ongoing debate in the circuits about the limits on and the ongoing vitality of the presumption of prejudice rule announced in *Remmer*." App. 10a. The court then noted its own earlier decision in *United States v. Bradshaw*, 281 F.3d 278 (1st Cir. 2002), in which it held that "two later Supreme Court cases, *United States v. Olano*, 507 U.S. 725, 737-39 (1993), and *Smith v. Phillips*, 455 U.S. 209, 215-17 (1982), narrowed the broad language in *Remmer*." App. 11a. After distinguishing an earlier First Circuit case that had applied the *Remmer* presumption, the court held that the presumption of prejudice did not apply in this case. App. 11a-12a.

Applying an abuse of discretion standard, the court found that the district court's denial of Mr. Tejeda's motion for mistrial based on the jury tampering incident was not error.

Instead, the court found that the steps taken by the district court in the wake of the incident, including its *voir dire* of all the jurors, satisfied the procedural requirement for investigating claims of jury taint. App. 13a-14a. Placing specific emphasis on the fact that all jurors had indicated they could be fair and impartial despite their fears and concerns about the throat-slitting gesture, the court further found that the district court had not abused its discretion in determining that the jury could be impartial. App. 14a-16a.

The First Circuit's review of the reasonableness of Mr. Tejeda's sentence was terse. App. 26a-27a. It found that the district court had adequately considered the parties' arguments and adequately explained its sentence, and found the sentence to be reasonable. App. 26a-27a. Perhaps troubled by the district court's failure to properly consider rehabilitation as a factor in sentencing, the First Circuit stated in a footnote that it interpreted the district court's statement concerning rehabilitation as a *factual* finding that "given the particular's of *Tejeda*'s offense, rather than drug offenses *in general*, the court did not think rehabilitation particularly likely." App. 27a n.12 (Emphasis in original.) This interpretation of the district court's treatment of the rehabilitation issue finds no support in the record. It was not advanced as a possible interpretation by Mr. Tejeda or the government, and it was nowhere suggested by the district court.

REASONS FOR GRANTING THE PETITION

I. *Remmer* Circuit Split

A. There Is a Split In the Circuits As To the Continuing Vitality Of the *Remmer* Presumption Of Prejudice.

As the First Circuit observed, there is a split in the circuits on the question of whether *Remmer*'s presumption of

prejudice is still good law.[1] Most circuits have held that *Remmer* continues to be good law, and have routinely applied the presumption of prejudice to claims of jury taint. *See, e.g.*, *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002); *United States v. Console*, 13 F.3d 641 (3d Cir. 1993); *United States v. Lentz*, 383 F.3d 191, 219 (4th Cir. 2004); *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996); *United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007); *United States v. Robertson*, 473 F.3d 1289 (10th Cir. 2007); *McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005). In contrast, the First, Fifth, and D.C. circuits have found that *Remmer*'s holding that private communications and tampering with juries are presumptively prejudicial has been effectively overruled by two subsequent cases of this Court, namely *Smith v. Phillips*, 455 U.S. 209, 215-17 (1982), and *United States v. Olano*, 507 U.S. 725, 737-39 (1993).

In *Smith*, this Court reviewed the grant of a habeas petition resulting from the fact that a juror had applied for a job with the district attorney's office while sitting on the jury. 455 U.S. at 215. The district court had conducted an inquiry and found that no actual prejudice had resulted from the juror's actions, but nonetheless "imputed bias" to the juror, and granted the petition based on the nature of the juror's conduct. This Court found that it had been improper for the district court to impute bias in the face of a finding that there had been no actual bias. Citing to long-standing precedent, the Court held that "the remedy for allegations of juror partiality is a hearing in which *the defendant has the opportunity to prove actual bias*." *Id.* (emphasis added). The courts that have found that *Smith* diminished the vitality of *Remmer* have seized on this language to hold that *Remmer*'s

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[1] Other circuits have also acknowledged this circuit split. *See, e.g.*, *United States v. Scull*, 321 F.3d 1270, 1280 & n.5 (10th Cir. 2003); *Parker v. Head*, 244 F.3d 831, 839 (11th Cir. 2001); *United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985).

presumption of prejudice cannot apply broadly to claims of juror bias. *See, e.g., United States v. Bradshaw*, 281 F.3d 278, 287 (1st Cir. 2002); *United States v. Sylvester*, 143 F.3d 923, 933-34 (5th Cir. 1998); *United States v. Williams-Davis*, 90 F.3d 490, 496 (D.C. Cir. 1996).

In *Olano*—a case which principally concerned the proper standard of review for "plain error" under Federal Rule of Civil Procedure 52(b)—this Court held that it was error for the Court of Appeals for the Ninth Circuit to find it "inherently prejudicial" that two alternate jurors were permitted to sit silently in the jury room while the actual jury deliberated, where the record included no evidence of actual prejudice. 507 U.S. at 740. The courts that have found that *Olano* compromised *Remmer* have held that this Court's rejection of the "inherently prejudicial" ruling of the Ninth Circuit signaled a retreat from the presumption of prejudice in *Remmer*. *Bradshaw*, 281 F.3d at 287; *Sylvester*, 143 F.3d at 934; *Williams-Davis*, 90 F.3d at 273.

Although the courts that have retreated from *Remmer* have all articulated the retreat differently, each has held that to the extent *Remmer*'s "presumption of prejudice" retains any vitality, it should only be applied sparingly as a matter of judicial discretion. For instance, the First Circuit in *Bradshaw*, noting that *Smith* and *Olano* had "cabined" *Remmer*, held that "the *Remmer* standard should be limited to cases of significant *ex parte* contacts with sitting jurors or those involving aggravated circumstances." 281 F.3d at 288 (quoting *United States v. Boylan*, 898 F.3d 230, 261 (1st Cir. 1990). The Fifth Circuit has held that the "*Remmer* presumption of prejudice cannot survive *Smith* and *Olano*," and as such only requires the government to prove a lack of prejudice upon a finding by the district court that prejudice is likely. *Sylvester*, 143 F.3d at 934. Finally, the D.C. Circuit, finding that *Smith* and *Olano*, "narrow[ed]" and "reconfigur[ed]" *Remmer*, has concluded that the *Remmer* presumption should only apply upon a district court's finding

that a "particular intrusion showed enough of a likelihood of prejudice to justify assigning the government a burden of proving harmlessness." *Williams-Davis*, 90 F.3d at 274. The Sixth Circuit has gone even further, holding that "*Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless." *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988).

Rejecting *Remmer* and shifting the burden of proof back to the defendant to prove prejudice, as the First Circuit did here, is often dispositive, and was unquestionably dispositive here. *See, e.g., United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984). *Pennell* is instructive. In *Pennell*, five jurors received anonymous phone calls urging them to find the defendant guilty, and the five jurors then discussed the phone calls with all the jurors during the next day of deliberations. *Id.* at 529. Similar to the instant case, the district court conducted individual *voir dire* of the jurors, some of whom expressed "nervousness" about or were "disturbed" by the calls. *Id.* Ultimately, as here, all jurors said they could remain impartial. *Id.* at 529-30. Relying principally on the jurors' assurances of impartiality, and ignoring *Remmer*, the district court denied defendant's motion for a new trial. *Id.* at 530. The Court of Appeals for the Sixth Circuit affirmed, acknowledging that "[w]ere *Remmer* . . . controlling, we would be hard pressed to affirm Pennell's conviction." *Id.* at 532. Finding that *Smith* had overruled the *Remmer* presumption of prejudice and that the burden was on the defendant to prove prejudice, the Sixth Circuit found that the district court had not abused its discretion in denying the defendant's new trial motion. *Id.* at 532-33. In short, *Pennell* demonstrates that the retreat from *Remmer* and its robust protection of defendants' right to be tried by a fair and impartial jury will often be dispositive. This was certainly the case here, where it was only by discarding *Remmer*, and

placing the burden firmly on Mr. Tejeda to prove actual prejudice resulting from the throat slitting incident, that the First Circuit was able to affirm the district court's denials of Mr. Tejeda's motions for a new trial.

B. This Is the Perfect Case In Which To Address the Split In the Circuits Regarding the Vitality of *Remmer*.

The facts of Mr. Tejeda's case are very similar to those in *Remmer*. As a result, this case presents the perfect opportunity to resolve the split in circuits as to the continued vitality of the presumption of prejudice. *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (citing two courts reaching differing conclusions on similar facts as reason for granting *certiorari*).

In *Remmer*, a juror who later became the jury foreman had been told by an acquaintance that the juror should attempt to "make a deal" with the defendant Remmer. *Remmer v. United States*, 350 U.S. 377, 381 (1956) (*Remmer II*). The juror reported the conversation to the judge, who then notified the prosecutor, who in turn contacted the FBI. *Id.* Defense counsel was not contacted. The FBI contacted the juror, indicating that it was investigating whether his acquaintance had committed a crime. *Id.* The defendant only learned of the improper juror contact and the ensuing investigation after the trial, at which time he moved for a new trial, which the district court denied without a hearing. *Id.* at 378.

On remand after *Remmer I*, the district court held a hearing during which the "foreman of the jury testified that the events described in no way affected his state of mind or his vote in arriving at the verdict." *Remmer v. United States*, 122 F. Supp. 673, 675 (D. Nev. 1954). While one juror testified that the foreman had told her post-deliberations that he had been under "terrific pressure," the district court found that this was related to the pressure of the trial itself, and not the complained-of incident. *Id.* at 675 n.5. As a

consequence, the district court determined that "the incident referred to had no effect whatever upon the judgment, or the integrity or state of mind of the foreman of the jury," *Id.* at 675, and denied the motion for new trial.

The *Remmer II* Court reversed, holding that the circumstances of the case—the suggestion to make a deal, the subsequent FBI investigation, and the fact that the juror had stated he was under pressure—resulted in the juror being "subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." 350 U.S. at 382. As such, this Court reversed the district court's determination that the presumption of prejudice was adequately rebutted and granted the defendant a new trial. *Id.* The Court arrived at this result even though the juror had specifically testified that the events in question had "in no way affected his state of mind or his vote in arriving at the verdict." *Remmer*, 122 F. Supp. at 675.

The facts of the instant case are similar, although even more egregious, than those in *Remmer*. Here, on the first day of evidence, two jurors saw a man make a physically threatening throat-slitting gesture toward them. On the second day of evidence, when the man who made the gesture was linked by a witness to an important piece of evidence in the case, a red van in which Mr. Tejeda was alleged to have engaged in drug transactions, those jurors became so concerned that they discussed the threatening gesture with the entire jury. The district court conducted *voir dire* of the jurors, several of whom expressed "fear," "concern," or "pressure" as a result of the incident. Yet, just like the district court in *Remmer*, the district court here denied defendant's motion for a new trial because the jurors testified they could remain impartial despite their fears and concerns, and despite the pressure.

The similarity between the facts of this case and those in *Remmer*—both involved sworn juror protestations of impartiality in the face of improper, private third party contact with the jury that placed acknowledged outside pressure on the jury (just one juror in *Remmer*, versus at least six jurors here)—highlights the fact that this case affords a unique opportunity to address the split in the circuits over *Remmer*'s continued vitality. *Lynce*, 519 U.S. at 436 (citing two courts reaching differing conclusions on similar facts as reason for granting *certiorari*).

The *Remmer* Court held that:

> "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229 (1954)

If *Remmer* still means what it says, namely that tampering, regardless of the identity of the tamperer,[2] with a juror during a trial about the matter pending before the jury is presumptively prejudicial, then the result in this case simply cannot stand. As in *Remmer*, the mere fact that jurors testified they could remain impartial is insufficient to rebut

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[2] In rejecting Mr. Tejeda's *Remmer* claim, the First Circuit made much of the fact that the person doing the tampering here was a private party, affiliated with Mr. Tejeda, and not the government. App. 12a. But under *Remmer*, the presumption of prejudice applies regardless of the affiliation of the tamperer. Indeed, in *Remmer*, as here, the person doing the tampering was a friend of the defense. *Remmer II*, 350 U.S. at 381.

the presumption of prejudice. And here there is nothing else in the record to which the government or the First Circuit has pointed, or to which anyone could point, to rebut the presumption. It is only by reading *Smith* and *Olano* as having reversed *Remmer* and eliminated the presumption of prejudice that the First Circuit could affirm the district court's denial of Mr. Tejeda's motion for a mistrial.

C. The Erosion of the Right of Criminal Defendants To Trial By Jury Raises an Important Question of Law that This Court Should Remedy.

The importance of the division in the circuits concerning the continued vitality of *Remmer* cannot be overstated. The *Remmer* presumption of prejudice provided robust protections to a criminal defendant's right to trial by a fair and impartial jury. Since *Remmer*, this Court has remained vigilant in its efforts to protect against erosions in defendants' rights to an impartial jury trial. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986), and most recently *United States v. Booker*, 543 U.S. 220 (2005) ("[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly."). The minority of circuits, including the First Circuit, that have explicitly or implicitly held that the *Remmer* presumption is a dead letter have retarded defendants' jury trial rights. This case provides a perfect opportunity to correct the view of these circuits.

Mr. Tejeda was tried in the First Circuit. Had he been tried in the Third, Fourth, Ninth, Tenth, or Eleventh circuits, where *Remmer* remains good law, he would have received a new trial. That Mr. Tejeda was tried in one circuit rather than another should not be the difference between a new trial and a sentence of 20 years. The split in the circuits regarding the vitality of *Remmer* cries out to be resolved. This is the case in which to achieve the resolution.

II. *Booker* Error

A. The District Court Failed to Treat the Guidelines As Advisory As Required Under *Booker*.

The question raised by the district court's sentencing of Mr. Tejeda is whether a sentencing court may disregard or deemphasize certain 18 U.S.C. § 3553(a) factors—here, the factor of amenability to rehabilitation—in sentencing a defendant. Because doing so violates both the letter and spirit of *Booker*, this Court should grant *certiorari* in order to clarify the obligations of district courts in sentencing defendants post-*Booker*.

The principal factor Mr. Tejeda relied upon in arguing that it would be unreasonable to sentence him within the applicable guidelines range was his amenability to rehabilitation.[3] Mr. Tejeda argued that his individual circumstances pointed to a strong likelihood of rehabilitation and a low chance of recidivism, sufficient to take his case outside the heartland of cases within the applicable guideline range. The argument was strongly supported by statistical analysis *done by the Sentencing Commission itself.* Specifically, Mr. Tejeda pointed to the following Sentencing Commission findings in support of his claim that he was a terrific candidate for rehabilitation and, therefore, a person for

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[3] Rehabilitation is one of the factors district courts must consider under 18 U.S.C. § 3553(a), and one of the principal purposes of punishment Congress intended to further in adopting the Sentencing Reform Act. *See* United States Sentencing Guidelines §1A.1, intro to comment., pt. A, ¶2 (The Statutory Mission) (Congress "foresees guidelines that will further the basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."). Mr. Tejeda's amenability to rehabilitation also spoke to several other § 3553(a) factors, including: his "history and characteristics," 18 U.S.C. § 3553(a)(1); the need to afford adequate deterrence, 18 U.S.C. § 3553(a)(2)(B); and the need to protect the public from future crimes of the defendant, 18 U.S.C. § 3553(a)(2)(D).

whom a sentence within the heartland of the guideline range would be unreasonable:

- Individuals like Mr. Tejeda who have no prior arrests are the most empirically identifiable group of offenders who are unlikely to re-offend. *See* United States Sentencing Commission, *Recidivism and the "First Offender"* (May 2004) at 17 (available at htttp://www.ussc.gov/research.htm).

- Individuals like Mr. Tejeda who have long-term, supportive familial relationships are less likely to recidivate. *See* United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 29 (available at http://www.ussc.gov/research.htm).

- Individuals like Mr. Tejeda who were gainfully employed in legitimate jobs during the year prior to their arrests are far less likely to re-offend than those who were unemployed. *Id.*

- For first time offenders like Mr. Tejeda, there appears to be no correlation between length of sentence and likelihood of recidivism. *Id.* at 31.

There is no evidence to rebut these facts, and the government made no effort to do so. Indeed, the government did not even attempt to suggest that Mr. Tejeda was not an exceptional candidate for rehabilitation.

In sentencing Mr. Tejeda, the district court stated:

"This sentence does not take into account rehabilitation. That's not quite right. It takes it into account, but it does not emphasize rehabilitation due to the nature of the offense." App. 3[illegible]

Here, the "nature of the offense," was a "crack cocaine" conspiracy involving a significant quantity of crack cocaine. App. 2a. As in any high-quantity crack cocaine case, a guideline sentence is inevitably very long. Such sentences, as the district court observed in sentencing one of Mr. Tejeda's co-defendants, "hold[] out no particular prospect of rehabilitation." App. 37a. Indeed, as the district court further observed, "we kid ourselves if we think that sentences this long as advised by congress and the sentencing commission will in fact rehabilitate people who are sent away for such a period." *Id.* This observation, as far as it goes, is obviously correct. We do "kid ourselves" if we think that 20 year sentences, like the one imposed upon Mr. Tejeda, will serve to rehabilitate. But that is precisely why it is imperative (and mandatory under Section 3553(a) and *Booker*) that in determining a reasonable sentence, the district court look not just at the "nature of the offense," but also at the individual offender and his/her own unique characteristics.

Here, by "not emphasiz[ing]" or "not tak[ing] into account rehabilitation," because of the "nature of the offense," the district court simply deferred to the guidelines. App. 33a. It treated the applicable guideline range as mandatory, and in the process disregarded the teaching of this Court in *Booker* – namely, that the guidelines are *advisory*. 543 U.S. 245-46. The district court's reasoning appears to have been:

(i) The guidelines call for a sentence of 20-25 years.

(ii) No one can be rehabilitated if he serves 20-25 years in prison.

(iii) Therefore, I need not consider—I may deemphasize—rehabilitation as a factor in determining Mr. Tejeda's sentence.[4]

But point (iii) does not follow from points (i) and (ii). Although the guidelines are a key sentencing factor, the mandate of *Booker* is that *all* of the Section 3553(a) factors – including rehabilitation, must be considered, and not just in the abstract but as they apply to individual defendants. *Booker*, 543 U.S. at 245-46.

B. The Court Should Grant *Certiorari* in Order to Clarify the Obligations of District Courts in Sentencing Defendants Post-*Booker*.

A sentence within the applicable guidelines range is "presumptively reasonable," *Rita v. United States*, -- S. Ct. --, 2007 WL 1772146, at *6 (2007), but not mandatory. The guidelines provide the starting point for analysis, not the end. District courts, post-*Booker*, must still consider the individual Section 3553(a) factors as they apply to individual defendants, as those factors—any one of them in the particular case—may rebut the reasonableness of the presumptively permissible. Here, the district court treated the permissible as an unrebuttable mandate—at least with respect to the possibility of rehabilitation. This was error. *Certiorari* is necessary to correct the error. More broadly, *certiorari* is necessary to: (i) clarify the advisory nature of the guidelines; and (ii) explain unambiguously that the presumptive

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[4] The First Circuit interpreted the district court's statement that the sentence does not emphasize rehabilitation due to the "nature of the offense" as a finding by the district court that "the particulars of Tejeda's offense, rather than drug offenses in general," meant that "the court did not think rehabilitation particularly likely." App. 27a n. 12. This interpretation was made up out of whole cloth. Nothing in the record supports it. To the contrary, the record makes clear the district court's view that all crack cocaine sentences "advised by congress and the sentencing commission" preclude rehabilitation. App. 36a.

reasonableness of a guidelines sentence does not and cannot absolve district courts from reviewing each and every § 3553(a) factor, *i.e.*, that the "nature of the offense" and the guidelines range advised by that nature do not trump individual offender characteristics and the other § 3553(a) factors.

Here, we have a case of the district court simply brushing aside Mr. Tejeda's legitimate argument about rehabilitation and placing the blame on Congress and the Sentencing Commission for making the guidelines range so high as to devalue rehabilitation. This is *not* the independent review of the § 3553(a) factors required by the statute and contemplated by this Court in both *Booker* and *Rita*. *See Rita*, Slip. 2007 WL 1772146 at *18 (Stevens, J., concurring) ("*Booker*'s standard of review allows—indeed, requires—district judges to consider *all* of the factors listed in §3553(a) and to apply them to the individual defendants before them."). Allowing the district court's decision against Mr. Tejeda to stand runs the risk feared by the dissenters in *Rita*, namely that the "advisory" Guidelines will become de facto mandatory, replicating the Sixth Amendment violation that *Booker* intended to remedy. *Id.* at * 32 (Souter, J., dissenting) ("But if sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right."). Any such result must be avoided.

CONCLUSION

For the foregoing reasons, William Tejeda's petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1824

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM TEJEDA,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, U.S. District Judge]

Before
Boudin, Chief Judge,
Torruella and Lynch, Circuit Judges.

[Heard Jan. 8, 2007.
Decided April 3, 2007.]

LYNCH, Circuit Judge.

William Tejeda was convicted after a twelve-day jury trial of conspiracy to possess with intent to distribute cocaine base in the amount of 50 grams or more. Tejeda was a New York supplier of drugs for a Cape Cod drug ring. This criminal appeal attacks both Tejeda's conviction and the sentence imposed. The attack on the conviction is based largely on an incident in the courtroom in which a spectator made a throat-slitting gesture.

Four of Tejeda's co-conspirators pled guilty, and two, Amanda Eldridge and Desiree Alves, testified against him. Tejeda and a co-conspirator, Carmen Figueroa, went to trial; she testified, he did not. Both were convicted. Tejeda was sentenced to twenty years' imprisonment, five years of supervised release, and a special assessment of $100.

As to his conviction, Tejeda does not attack the sufficiency of the evidence. The evidence against him was extremely strong, a point discussed later. He does argue that the trial court committed two errors that deprived him of a fair trial and require his conviction be set aside. The first claim of error is that the court should have granted a mistrial when an older man sitting in the gallery of the courtroom on the first day of trial (and later possibly connected to defendant by the evidence) made a throat-slitting gesture. That gesture was seen by two jurors and discussed by them with other jurors. The second trial error alleged was that the court erred in not severing Tejeda's trial from co-defendant Figueroa's or bifurcating the trial so as to isolate the case against him.

Tejeda also attacks his sentence on the grounds that the district court erroneously relied on the Guidelines applicable to crack cocaine offenses and that the sentence was unreasonable.

Acknowledging the able advocacy on both sides, we affirm the conviction and sentence.

I.

The facts in evidence at the trial fairly establish the following.

From January 2003 through March 2004, Tejeda supplied crack cocaine to a drug distribution ring operating in Cape Cod, Massachusetts. Tejeda was based in New York; his address, ironically, was 1234 Boston Road, in the Bronx. The Cape Cod ring was headed by Manuel Mendes, a co-defendant, who operated the ring while imprisoned at the Plymouth County House of Correction. That imprisonment limited Mendes in his mobility and in his command operations, but it did not stop him. Mendes operated the drug ring by giving instructions to co-defendant Figueroa, and sometimes to co-defendant Alves, both of whom he was permitted to telephone. Figueroa, in turn, contacted Tejeda and the other conspirators.

On Mendes' instructions, testifying co-conspirator Amanda Eldridge drove to New York in January 2003, along with Carmen Figueroa and Desiree Alves, to pick up crack from Tejeda. Eldridge already knew Tejeda from prior drug transactions. She identified Tejeda in court and had done so in an earlier photo array. Eldridge testified that in New York she met with Tejeda alone in a red van, picked up the drugs, and returned to Cape Cod. Eldridge's testimony was corroborated by Alves, who testified that these drug trips to New York took place about every two weeks.

Eldridge testified that, under Mendes' direction, she made the trip to New York to pick up drugs from Tejeda every week or so for a four-month period. Eldridge then drove back

to Cape Cod and gave the drugs to either Alves or Figueroa. Each time, Tejeda gave Eldridge disk-shaped packages containing crack cocaine. Eldridge also identified Tejeda's voice in a call recorded by the government. The recording captured Tejeda and Figueroa arranging a drug transaction for February 17, 2004 in New York.

The February 17, 2004 transaction went off as planned, as was established by the testimony of Alves and two drug enforcement officers who witnessed the event. Co-defendant Christopher Custer was the courier this time. Alves did not go on the trip, but she did give Custer the money to purchase the drugs the night before, and she received the drugs at her home in Yarmouth from Custer when he returned from his successful trip to New York.

The DEA had established surveillance over Tejeda's home in the Bronx and observed Custer's arrival and actions on February 17. Tejeda left his home and entered the red van. A short while later, Custer arrived, parked behind the van, and entered the van. Photographs of Tejeda at the scene of the February 17 deal were admitted into evidence at trial. Within approximately five minutes, Custer got back into his car and left. He was tracked by police as he drove back to Cape Cod and was seen entering Alves' home with a black bag and emerging without it.

The police made arrests immediately after observing another drug deal, this one on March 16, 2004. Custer, after again obtaining money on Cape Cod to pay for the crack, went to New York. Agents saw Tejeda leave the Boston Road address in the Bronx. Tejeda then got in a car, and police tracked the car to Manhattan. In Manhattan, an agent observed Custer on the same street as the car carrying Tejeda. A short time later, after losing sight of Custer, the agent saw Tejeda get out of the front passenger seat of the car, and Custer get out of the back passenger seat and into the front

passenger seat of the car. The police thereafter stopped the car; in it were two disk-like objects, which later tested positive for cocaine base. That evening Tejeda was arrested.

The government's case rested primarily on this evidence, and not on the testimony of the non-pleading co-defendant, Figueroa.

II. Trial Error Claims

A. *The Throat-Slitting Gesture and Fair Trial Rights*

1. *Facts And Procedural History*

On the morning of the third day of trial, Friday, May 6, 2005, the government's witness was Lt. Balcom. During questioning, Lt. Balcom indicated that on one occasion he had observed some of the individuals in the courtroom in the red van. At the prosecutor's request, Lt. Balcom pointed out these people in the courtroom.

During the morning break, a juror reported privately to the court that she and another juror had seen one of the individuals identified by Lt. Balcom make a throat-slitting gesture on the second day of trial, Wednesday, May 4. After the break and outside of the presence of the jury, the court inquired and was told by defense counsel that the man in question was Tejeda's grandfather. The jury was never informed of this fact.

The court reported to counsel, outside the presence of the jury, that a juror had stated that she had observed Tejeda's grandfather making a throat-slitting gesture. The court then ordered the gesturer and his wife to leave the courthouse and barred them from the courthouse and the surrounding vicinity. At least some members of the jury were later informed of the court's order. On the record, the court described the man

barred from the courtroom as an "obviously frail appearing, old man."

Tejeda and Figueroa both moved for mistrial. When the court discussed holding voir dire of the two jurors who reportedly had seen the gesture, Tejeda's counsel expressed concern that the proposed voir dire would only heighten the issue for the jury.

Before starting the trial again that Friday, the court said to the jurors:

> A matter has been conveyed to ... me and I have taken care of it completely. Put it out of your mind. It has nothing to do with this case. Have in mind, while the report is fully appropriate, indeed we want such a report, do not discuss the case among yourselves, the case now, in the jury room.

Tejeda did not object to the instruction, and the trial continued for the day. Later, several of the jurors, on query, said that the jury had complied with this instruction. Assuming that to be true, any discussion amongst the jurors occurred before the court dealt with the report of the gesture.

On Sunday, May 8, Tejeda submitted a written mistrial motion. On Monday, May 9, the court denied the motion but told the parties it would grant their request to voir dire the juror who had reported the gesture, Juror 11.

The court then individually questioned Juror 11. She said that she was concerned about the gesture but did not report it on the day she saw it. It was only after she heard the testimony of Lt. Balcom identifying the spectator as having been at the red van that she started to feel uncomfortable about what she had seen the spectator do two days earlier. After hearing Lt. Balcom's testimony on Friday morning, she

reported the gesture to several of the other jurors, some of whom told her she should disclose it to the court, and so she did. The court had earlier instructed the jurors not to discuss the case.

When asked whether she had linked the individual making the gesture to any particular party in the case, Juror 11 answered that she didn't know whether the older gentleman and the lady who had been sitting with him had anything to do with a particular person or side. The juror stated that all she knew was that Lt. Balcom had testified to seeing one of them in the red van. While she recognized the public nature of the courtroom setting, she was concerned that people in the courtroom could know the names of the jurors. The court asked whether she could put the incident out of her mind when evaluating the case and be fair to all parties. She answered affirmatively, and the court, observing her, found her to be forthcoming. Tejeda again moved for mistrial.

The court then questioned Juror 6, who also had seen the gesture. Juror 6 described the gesture as odd and a strange thing to do in the middle of a court proceeding but did not think there was anything to it. She said that it was unclear to her toward whom the gesture was directed. Juror 6, like Juror 11, answered in the affirmative as to her ability to be fair and impartial. The court then denied the motion for mistrial.

At the request of Tejeda's counsel, on the fifth day of trial, Tuesday, May 10, 2005, the court conducted a voir dire of the remaining jurors. None of the other jurors had seen the incident; all but one said that they had heard of it from Jurors 11 and/or 6. The jurors reported that they did not discuss the incident other than on the Friday morning before it was reported.

Each juror was asked whether he or she could be fair and impartial, and every one responded in the affirmative. While

several of the jurors indicated that they thought the gesture was inappropriate, no juror expressed fear for his or her safety. Two jurors reported that the gesture had been unsettling or disconcerting for the jurors who had seen it. One juror stated that the reported gesture put pressure on the jury, but that the remedial action taken by the court had been appropriate. Another juror stated that there could be safety concerns, but after hearing of the court's order barring the gesturer from the courthouse, she stated that she was satisfied with her own safety. One juror reported that he knew nothing of the gesture.

Following the voir dire of the entire jury, Tejeda renewed his motion for a mistrial and also requested that the jury foreperson, Juror 11, be deemed an alternate so she would not participate in the jury deliberation. These motions were ultimately denied.

The jury returned a verdict of conviction. Thereafter, Tejeda filed a motion for new trial based on, inter alia, the throat-slitting incident. At that time, Tejeda did not argue that the purported error was a structural one, or that the court was required to apply a presumption of prejudice to the gesture. The court denied the new trial motion.

2. *Appropriate Analytical Framework*

a. *Structural Error*

Tejeda argues that it is clear that the jury here was not impartial, despite the trial judge's finding to the contrary and the jurors' individual declarations that the incident did not render any of them unable to remain impartial in reaching a verdict.

Tejeda leaps from this purported factual certainty to an argument, presented for the first time on appeal, that this issue

must be analyzed as structural error. Tejeda would like this to be so because in structural error cases the defendant is entitled to automatic reversal. We reject Tejeda's argument.

Structural error analysis has been constricted in its use to a limited category of claimed errors, none of which fits this case. The Supreme Court has held that it is structural error for a criminal defendant to be tried before a *judge* who has a financial interest in convicting him. *Tumey v. Ohio*, 273 U.S. 510, 523, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927). Tejeda infers from *Tumey* that his claim that a *juror* is biased must also be analyzed as a structural error. This is not a situation in which one or more jurors has a financial interest in convicting the defendant. We reject Tejeda's argument. The law is clear both that this is not the stuff of structural error and that Tejeda's jury bias claim is subject to a different standard of review. On review, the appellate court asks whether the trial court abused its discretion in denying a mistrial. That standard gives deference to the trial judge, who is in the best position to evaluate the matter.

Mere error in the trial process itself is not structural error. *United States v. Gonzalez-Lopez*, --- U.S. ----, ---- - ----, 126 S.Ct. 2557, 2563-64, 165 L.Ed.2d 409 (2006). Structural errors are reserved for cases where criminal defendants are denied basic protections which "necessarily render a trial fundamentally unfair" such that "no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)) (internal quotation marks omitted). Tejeda's claim of juror bias is not within this very limited class of cases. *See United States v. Mackey*, 114 F.3d

470, 474 (4th Cir.1997) (juror bias and misconduct claims are not structural errors).[5]

b. *The* Remmer *Presumption of Prejudice*

On appeal, Tejeda also argues for the first time[6] that he is entitled to a presumption of prejudice under *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). We hold that the *Remmer* presumption does not apply here.

In *Remmer*, the defendant learned after his conviction that a third party had attempted to bribe a juror to get a verdict favorable to the defendant, and he moved for a new trial. *Id.* at 228, 74 S.Ct. 450. The court had not informed defense counsel of the bribe, but had initiated an investigation of the bribe and had held an ex parte meeting with the prosecution. *Id.* The defendant's motion for new trial was denied. *Id.* at 229, 74 S.Ct. 450. The Supreme Court held that Remmer was not entitled to an automatic reversal, but rather to a hearing before the trial court, and that the jury tampering would be presumed to be prejudicial. *Id.* at 229-30, 74 S.Ct. 450.

There is an ongoing debate in the circuits about the limits on and the ongoing vitality of the presumption of prejudice rule announced in *Remmer*. *Compare United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir.1984) (presumption of prejudice no longer exists), with *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir.1998) (proper inquiry is whether

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[5] As the Ninth Circuit has noted, it would be inconsistent with the Supreme Court's decision in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), discussed below, to apply structural error review to these sorts of jury bias issues. *See United States v. Dutkel*, 192 F.3d 893, 899 n. 4 (9th Cir.1999).

[6] Tejeda claims that he made this argument below, but we are unable to find support for that assertion in the record.

likelihood of prejudice is high enough to assign to the government the burden of proving harmlessness), *United States v. Williams-Davis*, 90 F.3d 490, 497 (D.C.Cir.1996) (same), *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (presumption applies "when the extraneous information is of a considerably serious nature," such as " when a juror is directly contacted by third-parties"), *United States v. Dutkel*, 192 F.3d 893, 897 (9th Cir. 1999) ("[A] presumption of prejudice arises if a juror was subjected to coercion or bribery, and if this intrusion may have affected the juror in the exercise of his judgment."), *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003) (prejudice presumed "[w]hen members of a jury are exposed to extraneous information about a matter pending before [them]"), and *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2000) (similar). As we discussed in *United States v. Bradshaw*, 281 F.3d 278, 287 (1st Cir. 2002), two later Supreme Court cases, *United States v. Olano*, 507 U.S. 725, 737-39, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), and *Smith v. Phillips*, 455 U.S. 209, 215-17, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), narrowed the broad language in *Remmer*.

This court has already rejected defendant's argument that the *Remmer* presumption applies to all claims of juror bias resulting from extraneous contacts. *See, e.g., Bradshaw*, 281 F.3d at 288-89; *United States v. Gomes*, 177 F.3d 76, 82-83 (1st Cir. 1999); *United States v. Boylan*, 898 F.2d 230, 260-62 (1st Cir. 1990).

We employed the presumption of prejudice in *United States v. Gaston-Brito*, 64 F.3d 11 (1st Cir.1995), where a trial court summarily denied, without conducting any inquiry, a motion for mistrial made before the verdict. *Id.* at 13. We did so in the context of holding that a trial court is obligated to "conduct a sufficient inquiry to determine whether the communication was harmless." Id. (quoting *United States v. O'Brien*, 972 F.2d 12, 14 (1st Cir. 1992)) (internal quotation

marks omitted). Tejeda relies on *Gaston-Brito* to argue that given "the jurors' expressions of fear and concern ..., it [was] error to find that ... Tejeda was not prejudiced by the throat-slitting gesture."

Gaston-Brito is inapposite. In *Gaston-Brito*, a cooperating witness was asked to identify the person who had threatened to kill his daughter if his wife did not turn over drug proceeds. A case agent seated at the prosecution table pointed to the defense table, possibly indicating to the jury that the defendants had made the threat, although no evidence established that. *Id.* at 12. The gesture at issue here is of a completely different nature.

There are other distinctions. As *Gaston-Brito* noted, the government created the problem there when a case agent for the prosecution made an inappropriate gesture conveying substantive evidence. *Id.* at 13. Since the jury could well think that the agent had inside information, there was a risk the jurors would consider the information during deliberations. *Id.* The court in *Gaston-Brito* said it was applying a heightened standard when the prosecution was responsible for improper ex parte conduct.[7] *Id.* Here, the gesture did not come from the prosecution and was not an effort to put evidence in front of the jury. We add that there are different considerations at play when a defendant attempts to vacate a conviction, in the face of overwhelming evidence of guilt, on the basis that someone associated with the defense made an improper gesture to the jury. For example, we would not want to create an incentive for such gesturing by individuals associated with defendants.

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[7] Similarly, in *O'Brien*, we applied a presumption of prejudice when a police officer who had been summoned to testify on behalf of the government (but who had not yet testified) engaged in conversation with three jurors in the hallway outside the courtroom during a recess. 972 F.2d at 13.

3. *Merits Analysis*

Our usual standard of review once the trial judge has made an appropriate inquiry, and the one that we utilize here, is an abuse of discretion standard, which recognizes that the district court "has wide discretion in deciding how to handle and how to respond to allegations of juror bias and misconduct that arise during a trial." *United States v. Rodríguez-Ortiz*, 455 F.3d 18, 23 (1st Cir. 2006); see also *United States v. Mikutowicz*, 365 F.3d 65, 74 (1st Cir. 2004); *Bradshaw*, 281 F.3d at 286-87. We review the district court's factual findings for clear error. *Bradshaw*, 281 F.3d at 291.

Where a colorable claim of jury taint surfaces before jury deliberations occur, our law describes the sequence of steps a trial judge should take. *See id.* at 289. The judge should investigate the allegation promptly, addressing whether the taint-producing event occurred, and if so, assessing the magnitude and extent of any prejudice caused. *Id.* The trial court has wide discretion in how it goes about this inquiry. *Id.* at 290. The district court, if faced with the issue initially post-verdict, may convene an evidentiary hearing, but it is not obligated to do so. *Boylan*, 898 F.2d at 258.

If the court determines that there is a taint-producing event and a significant potential for prejudice, the trial court should then examine whether prophylactic measures will alleviate the prejudice (and if so, take them), or whether the threat can otherwise be dispelled or disproved. *Bradshaw*, 281 F.3d at 289. The court may determine that no curative measures will suffice and grant a timely motion for a mistrial. Id.

Here, the court followed every step in the procedure. There is no realistic objection to the process it used. Rather,

Tejeda's attack is on the court's conclusion that any potential prejudice had been adequately addressed. The court did not apply an incorrect legal standard, so we review its conclusion for abuse of discretion.

This case involves (1) a risk of a perception by a juror of an implicit threat from someone who might, in the juror's view, be associated with the defendant; and (2) the risk that this "threat" might influence the juror's ability to impartially evaluate the evidence. These risks are weighed against the individual jurors' own statements that they were not so influenced and the trial judge's findings of fact that the jurors could fairly and impartially reach a verdict.

The risks in this case are considerably weaker than those posed by the facts in *Rodríguez-Ortiz*, where we upheld a district court's denial of mistrial. 455 F.3d at 23-24. There, a juror reported he had received an explicit death threat related to the case. *Id.* at 24. On inquiry, the juror said he could remain impartial, and the court concluded he could do so. *Id.* Other circuits have likewise affirmed the denial of a mistrial when a juror was threatened but assured the court that he could remain impartial in deciding the case. *See, e.g.*, *United States v. Simmons*, No. 99-50381, 2000 WL 429704, at *1-2 (9th Cir. Apr. 20, 2000) (unpublished table decision) (mem.) (affirming denial of mistrial when spectator made gestures during closing arguments that made some jurors feel threatened); *Leisher v. Conrad*, 41 F.3d 753, 754-55 (D.C. Cir. 1994) (affirming denial of mistrial when two jurors misinterpreted as menacing a gesture made by defendant outside of courtroom); *United States v. Garner*, No. 90-5613, 1991 WL 150788, at *2, 3 (6th Cir. Aug. 6, 1991) (unpublished table decision) (per curiam) (affirming denial of mistrial when juror was threatened by men presumed to be affiliated with defendant who made noise like a gunshot outside the courtroom); *United States v. Zelinka*, 862 F.2d 92, 93, 94-96 (6th Cir. 1988) (affirming denial of mistrial when

spectator who appeared to be associated with defendant made statement that it would be too bad if the elevator the jurors were boarding should crash, causing fear on the part of some of the jurors).

Tejeda argues that more than a single juror is involved, which increases the risk of taint. This, he says, necessarily requires a different result from that reached in *Rodríguez-Ortiz*. It does not. The implicit threat, while serious, was of a different nature than the direct threat in *Rodríguez-Ortiz*. Further, it is unclear here to whom the gesture was intended, and here there was a possible, but not direct, association between the threat and the case.

Importantly, the district court did not ignore the risk that one or more of the jurors could perceive this gesture as a threat or that a threat might impair impartiality. First, the court took immediate remedial action. The court had the spectator who was the source of the "threat" removed from the courtroom and informed the jurors not to be concerned. The elderly spectator was no longer present when the evidence connecting the red van to the defendant became stronger at trial, and at least some of the jurors were informed that the spectator was not permitted to be in the vicinity of the courthouse. Second, the court queried each juror about whether the throat-slitting gesture would render him or her unable to impartially evaluate the evidence. The court observed the demeanor of each juror and concluded that each could be impartial.

Nor did the court leave the incident for further conversation and musings among the jurors. The court instructed them not to discuss it, and, those who were later questioned said the jurors had complied with that instruction. Normally, if jurors say they have followed instructions, their statements are credited. *Cf. Penry v. Johnson*, 532 U.S. 782,

799, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); *Boylan*, 898 F.2d at 263.[8]

There are, of course, extreme cases in which jurors' responses will not be credited. *See Bruton v. United States*, 391 U.S. 123, 135-36, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." (citations omitted)). This is the argument that Tejeda makes-that the incident was so strongly and indelibly harmful that no instruction and no voir dire could cure it. Tejeda adds that the jurors' voir dire responses demonstrated that they would not be able to disregard the gesture in reaching a decision in the case. We disagree for the reasons stated above.

The district court did not abuse its discretion in its handling of the throat-slitting gesture. Rather, it responded sensitively and correctly.

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[8] Similarly, where the claim is that jurors have been tainted by exposure to improperly admitted inflammatory evidence, our rule is that jurors are presumed to properly follow curative instructions. *See United States v. Sepulveda*, 15 F.3d 1161, 1185 (1st Cir.1993). That presumption is overcome only by a showing that it is probable that (1) responsible jurors will be unable to disregard the evidence, and (2) the evidence likely will have a seriously prejudicial effect on the defendant. *Bradshaw*, 281 F.3d at 285.

B. *Severance and Bifurcation*

Appellate review of trial court decisions to sever trials of criminal co-defendants is for manifest abuse of discretion. *United States v. DeLeon*, 187 F.3d 60, 63 (1st Cir. 1999); *Boylan*, 898 F.2d at 246. Ordinarily, criminal co-defendants are to be tried together. *United States v. Houle*, 237 F.3d 71, 75-76 (1st Cir. 2001). This rule has particular resonance in drug conspiracy cases, where multiple defendants often share a single indictment. *See United States v. Soto-Beníquez*, 356 F.3d 1, 29 (1st Cir. 2003). Tejeda bears the burden of making "a strong showing of prejudice" in order to gain a new trial. *Boylan*, 898 F.2d at 246 (quoting *United States v. Porter*, 764 F.2d 1, 12 (1st Cir. 1985)) (internal quotation marks omitted).

Tejeda twice moved to sever his trial from that of his co-defendants. He did so as to all co-defendants by motion before trial. Later, on the first day of trial, he orally moved to sever his trial from that of co-defendant Figueroa, after he learned that Figueroa would testify and present a battered woman defense as to her relationship with Mendes.[9] Her testimony would be that Mendes regularly beat her. Her proffer indicated that she would not implicate Tejeda in the abuse she suffered.

On appeal, the only issue has to do with the motions to sever the case against Figueroa. Tejeda's severance motion argued that it was likely that Figueroa would take the stand and admit her involvement in the conspiracy, but present a case of duress because she had been under the influence of Mendes, who had pled guilty. The court denied the motion for severance saying Tejeda could cross-examine Figueroa, and that no inconsistent defenses were involved.

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[9] Figueroa had informed the court and counsel of this defense when she moved on April 27, 2005 to continue the trial so she could prepare such a duress defense. The court denied the motion for a continuance.

On May 12, 2005, Tejeda proposed to the trial court that it bifurcate the trial, differentiating the evidence applicable to his case and to Figueroa's. Specifically, Tejeda proposed that he put on his case, the prosecution put on its rebuttal, then the jury decide on Tejeda's guilt or innocence alone. Thereafter, Figueroa would present her defense, the prosecution its rebuttal, and the jury would then render its verdict as to Figueroa. The court denied Tejeda's motion. The motion was renewed at the close of the prosecution's case-in-chief and again denied.

The prosecution questions whether the severance motion on the day of trial and the bifurcation motion[10] were timely. *See* Fed. R. Crim. P. 12(b)(3)(D) (severance motions must be made before trial). We bypass the question and rule on the merits.

Severance should be granted where "defenses are so *irreconcilable* as to involve fundamental disagreement over *core and basic facts*." *United States v. Peña-Lora*, 225 F.3d 17, 34 (1st Cir. 2000) (quoting *United States v. Paradis*, 802 F.2d 553, 561 (1st Cir. 1986) (emphases added)) (internal quotation marks omitted). But where there is merely some dissonance, where the defenses are just "somewhat antagonistic," we will usually not reverse a trial court's denial of severance. *United States v. Serafino*, 281 F.3d 327, 329 (1st Cir. 2002). Tejeda relies on *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), to argue that severance was necessary in this case. But in Johnson, the co-defendants' theories of defense were truly antagonistic. While Johnson defended on the basis that he was not present when the charged crime was committed, his co-defendant made a

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[10] Although unusual, bifurcation has been used. *See United States v. Zarnes*, 33 F.3d 1454, 1471-72 (7th Cir. 1994); *United States v. Joshi*, 896 F.2d 1303, 1306-09 (11th Cir. 1990).

confession explicitly and necessarily incriminating Johnson and defended only on the basis that he lacked the necessary mens rea. *Id.* at 1131-32.

Here, by contrast, there was no true antagonism of defenses. Tejeda's defense explicitly acknowledged there was a drug conspiracy; he simply argued the prosecution could not prove beyond a reasonable doubt that he was the New York source of drugs for the conspiracy. Thus, Figueroa's defense that there was a drug conspiracy, but that she had acted under duress, was not an antagonistic defense at all. Her defense did not in any way hinge on Tejeda's participation in the conspiracy. Indeed, even if the jury accepted her duress defense it could either accept or reject Tejeda's defense. Severance is not required every time a duress defense is asserted by one defendant. *Peña-Lora*, 225 F.3d at 34; *United States v. Arias-Villanueva*, 998 F.2d 1491, 1507 (9th Cir. 1993), overruled on other grounds by *United States v. Jimenez-Ortega*, 472 F.3d 1102, 1102-04 (9th Cir. 2007).

Even if Tejeda had shown that severance from Figueroa was appropriate in this drug conspiracy case, it was his burden to show prejudice. *Boylan*, 898 F.2d at 246; *Porter*, 764 F.2d at 12. "[P]rejudice means more than just a better chance of acquittal at a separate trial." *Boylan*, 898 F.2d at 246 (quoting *United States v. Martinez*, 479 F.2d 824, 828 (1st Cir. 1973)) (internal quotation marks omitted). "Garden variety" prejudice, which always exists when more than one defendant or offense are tried together, does not warrant a new trial. *Id.* Tejeda has not met his burden here.

Tejeda's real argument is not one of antagonism. It is that Figueroa's testimony about being regularly beaten by her boyfriend Mendes, the head of the conspiracy, would spill over to Tejeda, who was accused of conspiring with Mendes in drug distribution. This is a sort of argument that "you are known by the friends you keep," and bad friends will taint

you in the jury's eyes. It is almost inherent in drug conspiracy cases that a co-conspirator may have engaged in other types of blameworthy conduct. That is not enough to warrant severance of co-defendants' trials. While Mendes' treatment of Figueroa may have been more shocking than run-of-the-mill blameworthy conduct from drug co-conspirators, Tejeda's role in the conspiracy-as a geographically-removed supplier several states distant-lessened the risk that the jurors might ascribe Mendes' conduct to him. Moreover, the trial judge instructed the jury that evidence of Mendes' mistreatment of Figueroa was not to be considered in the case against Tejeda.

Figueroa did identify Tejeda in court as the drug ring's New York source of supply. She also testified about numerous trips to New York to pick up drugs. But all of this testimony, including the identification, was cumulative of Eldridge's testimony. There was more than sufficient evidence against Tejeda without Figueroa's identification. In any event, Figueroa's testimony regarding Tejeda was admissible against Tejeda regardless of whether the trials were severed. Further, Tejeda was permitted to cross-examine Figueroa at trial, minimizing any thought of misconduct by association.

The district court did not abuse its discretion in denying the severance motion. Nor was there any abuse of discretion in the denial of the bifurcation procedure. Such a procedure risked confusion of the jury and unwarranted singling out of the case against Tejeda.

Given that we have found no error in the district court's handling of the throat-slitting gesture or the severance and bifurcation motions, Tejeda's cumulative error claim is without merit.

III. Sentencing Claims

A. *Application of Crack Cocaine Guidelines*

We review de novo sentencing issues involving questions of law. *United States v. McCarthy*, 77 F.3d 522, 535 (1st Cir.1996).

The government argues that Tejeda has forfeited his claim that the district court erred in applying the crack cocaine Sentencing Guidelines, and that review therefore should be only for plain error. *See* Fed. R. Crim. P. 52(b); *see also Olano*, 507 U.S. at 732-35, 113 S.Ct. 1770. The government notes that Tejeda failed to object to the district court's limiting of the verdict slip to refer only to "cocaine base" and not "crack." Nor did he object to the district court's statement at the charge conference that it would decide the crack issue in a jury-waived proceeding, or the district court's instruction to the jury, which equated crack with cocaine base. The prosecution argues that Tejeda's presentencing motion to preclude application of the crack Guidelines was insufficient to preserve the claim because it was at that time too late to present the issue to the jury. *See United States v. Pacheco*, 434 F.3d 106, 115 (1st Cir.2006).

We bypass the question of forfeiture because even if Tejeda preserved his claim, it fails on the merits. As Tejeda conceded before the district court, our decision in *United States v. Medina*, 427 F.3d 88 (1st Cir. 2005), forecloses any argument that as a general matter the government must prove to the jury beyond a reasonable doubt that the cocaine base at issue is crack cocaine. In *Medina*, the defendant was convicted of, inter alia, possession with intent to distribute over fifty grams of cocaine base. *Id.* at 90. On appeal, Medina argued that the trial court had erred in not instructing the jury that the government was required to prove that the cocaine

base he possessed was crack cocaine.[11] *Id.* at 92. This court held that "the government is not required to prove that the substance involved in a given case is crack in order to secure a conviction under" 21 U.S.C. § 841, the statute specifying the substantive offense that was the object of the conspiracy for which Tejeda was convicted. Id. The fact that the cocaine base was crack was "only relevant to the court at sentencing." *Id.* at 92 n.3. Moreover, in *United States v. O'Brien*, 435 F.3d 36 (1st Cir. 2006), we held that, as long as the statutory maximum is not affected, a sentencing judge is permitted to determine by a preponderance of the evidence the factual basis for a sentencing enhancement. *Id.* at 41. Such was the case here. There was no error in the district court's determining that the cocaine base at issue in this case was crack.[12]

Tejeda argues that the sentencing court was not permitted to make the crack determination *in his case* because it was the law of the case that all sentencing enhancements be proved to the jury beyond a reasonable doubt. This argument is without merit. At times the court did state that it would require the government to prove sentencing enhancements to the jury beyond a reasonable doubt; but it also determined that whether the cocaine base at issue was crack cocaine would be decided in a jury-waived proceeding, and it further decided at sentencing that it was permitted to make the determination that the cocaine base was crack. The court was not prohibited from revising its position on proof of sentencing enhancements to the jury. *See Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005) ("[L]aw of the case permits a

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[11] The issue in *Medina* was different. Medina argued that the jury instruction was error because the statute at issue, 21 U.S.C. § 841, regulated only possession of crack, not cocaine base more generally. 427 F.3d at 92.

[12] Tejeda does not dispute that there was sufficient evidence presented at trial to conclude that the drugs at issue were crack.

lower court to review prior interlocutory orders as long as that review is not an abuse of discretion."); *Fiori v. Truck Drivers, Local 170*, 354 F.3d 84, 90 (1st Cir. 2004) (stating that law of the case doctrine does not bar the district court from revising a prior ruling, as long as prejudice does not result).

Tejeda argues that he was prejudiced by the district court's change of position because (1) the court never conducted a jury-waived proceeding to determine whether the cocaine base at issue was crack cocaine and (2) the court had promised this jury-waived proceeding, and as a result, the trial record, on which the district court relied in determining that the cocaine base was crack, was underdeveloped with respect to the crack issue.

Tejeda is correct that the district court repeatedly stated that the government would not be able to seek a sentencing enhancement for crack unless it had pled and proved the issue to the jury. It is possible that the court's about-face at the sentencing disposition[13] might have constituted "unfair

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[13] The district court did in fact conduct a jury-waived proceeding on the crack issue on September 22, 2005. At that proceeding, Tejeda offered an expert to testify to the difference between crack and other forms of cocaine base. However, the parties all agreed that crack was merely one form of cocaine base, and there was no factual dispute as to whether crack and cocaine base were one and the same. Tejeda also offered his expert to cast doubt that the drugs seized on March 16, 2004 from the car in which Tejeda had been riding were crack. He proffered that his expert would testify that while the DEA had concluded that a different drug sample seized from co-conspirator Custer's home was crack, the DEA had not concluded that the drugs linked to Tejeda were crack. This was an inaccurate characterization of the DEA's conclusions, as the prosecution pointed out. The parties had stipulated that the DEA had concluded that both tested samples contained cocaine base. The DEA had made no finding as to whether either sample contained crack cocaine. As a result, Tejeda's expert's testimony would not have been informative on any factual dispute. The district court solicited additional briefs from the

surprise." *See, e.g., United States v. Moody*, 903 F.2d 321, 331 (5th Cir. 1990) ("There is also an element of unfair surprise in the court's belated reversal concerning Bauman's testimony.... By reversing its earlier ruling, ... the district court was obliged to provide Moody an opportunity for surrebuttal, assuming of course that the defense could proffer evidence to parry the expanded government case.") It would have been better for the court here to have explicitly informed the parties of its ruling that it could determine the crack enhancement in the absence of a jury verdict and allowed the parties to submit factual evidence with regards to the enhancement.

The evidence that Tejeda states he would have offered, however, would not have precluded the court from finding that the crack Guidelines were applicable. Prior to sentencing, Tejeda submitted a brief to the district court in which he claimed-in a footnote-as he does now, that the DEA's test results showed that the drug sample linked to Tejeda had not tested positive for sodium bicarbonate, a "signature ingredient" of crack. Tejeda did not purport to have performed any independent tests of the drug sample connected to him, but rather relied solely on the DEA's analysis. Tejeda attached to his brief the DEA's work papers and test results. As a result, at the point it made its determination that the drugs at issue in the case were crack, the district court had before it the very results on which Tejeda's expert would have offered testimony. Moreover, even if Tejeda is correct that the particular sample tested by the DEA did not contain sodium bicarbonate, there nonetheless was ample evidence at trial for the district court to conclude that the drugs involved in the conspiracy were crack. Three law enforcement officers testified, based on

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parties and stated that if necessary, it would convene an evidentiary hearing at some point in the future.

visual observation, that the drugs seized from the car on March 16 were crack, and Eldridge and Figueroa both testified that the drugs regularly purchased from Tejeda were crack. *See United States v. Walters*, 904 F.2d 765, 770 (1st Cir. 1990) ("Proof based on scientific analysis or expert testimony is not required to prove the illicit nature of a substance, and identification of a substance as a drug may be based on the opinion of a knowledgeable lay person."). The identity of the drugs that Tejeda dealt does not hinge on this one sample.

As to Tejeda's second argument, it is unpersuasive for Tejeda to suggest that he would have presented an expert at trial had he known what would be the nature of the jury-waived proceeding. Tejeda did attempt to have his expert testify at trial. In his proffer Tejeda indicated that the expert would testify about the difference between cocaine base and crack cocaine and the difficulty of telling the two apart visually. The district court, however, refused to allow the expert to testify because the request was not timely,[14] and because, the court concluded, the testimony would confuse the jury. The court did say at the time it precluded the expert from testifying that it would hear the expert at the time of sentencing. But this was not the reason that the expert was precluded from testifying at trial.[15]

The jury was not required to find that the cocaine base possessed by Tejeda was crack. The district court did not abuse its discretion when it revised its position on proof of

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[14] Tejeda conceded this in the district court.

[15] Tejeda also refers to thwarted attempts to cross-examine the government's witnesses about the differences between crack and cocaine base. Tejeda was precluded from questioning government witnesses about the chemical differences between crack and other types of cocaine base because the witnesses in question were not chemists and were not qualified to testify on the subject.

sentencing enhancements. Tejeda was not prejudiced by the district court's revision of its prior ruling.

Finally, Tejeda argues that the district court's deciding that the crack cocaine Guidelines applied violated his protection against double jeopardy and his due process rights. Tejeda essentially argues that the government failed to prove at trial that the drugs were crack, and that he should not have been forced at sentencing to once again mount a defense to such a charge. There was no error in the district court's application of the crack cocaine Guidelines, much less a due process violation. Likewise, double jeopardy principles are inapplicable here. Double jeopardy concerns arise only when a jury verdict or a trial court's ruling, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Pacheco*, 434 F.3d at 112 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)) (internal quotation marks omitted). There was no such trial court ruling here. Whether or not the cocaine base at issue was crack is not a factual element of the offense charged. *Medina*, 427 F.3d at 92 & n. 3.

B. *Reasonableness of Tejeda's Sentence*

Tejeda argues that his sentence is unreasonable as a matter of law. *See United States v. Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir.2006) (en banc). He argues that the nature and circumstances of his offense, his personal history and characteristics, his potential for rehabilitation, sentences imposed by other federal courts, and the sentences imposed on his co-defendants all weigh in favor of his receiving the mandatory minimum sentence of 120 months. Tejeda's counsel made all of these arguments to the district court at his sentencing hearing.

The district court explained its reasons for imposing a twenty-year sentence. It discussed the fact that Tejeda was "the supplier in a massive [crack] distribution ring" and stated that "crack cocaine is one of the most addictive, dangerous substances known to our society." The court stated that its sentence took rehabilitation into account, although the court did not think rehabilitation particularly likely,[16] and it referred to Tejeda's family circumstances, concluding that while they were tragic, they had been caused by Tejeda. The court further stated that comparison to the average sentence imposed by other courts for the offense in question was not necessarily instructive since that average did not account for factors such as drug quantity. Finally, we note that "[a]lthough a district court may consider disparities among co-defendants in determining a sentence, [a defendant's] sentence [is not] unreasonable simply because his co-defendants agreed to help the government in exchange for reduced sentences." *United States v. Vázquez-Rivera*, 470 F.3d 443, 449 (1st Cir. 2006). Tejeda's sentence is not unreasonable.

Tejeda's conviction and sentence are *affirmed.*

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[16] We disagree with Tejeda's assertion that the district court did not consider his particular potential for rehabilitation. The court stated that the sentence did not " emphasize rehabilitation due to the nature of the offense." We understand this to mean that given the particulars of *Tejeda's* offense, not drug offenses *in general,* the court did not think rehabilitation particularly likely.

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA

V.

WILLIAM TEJEDA

Case Number: 1:04-CR-10090-005-WGY

THE DEFENDANT:
was found guilty on count 1ss after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**
21 USC § 846	Conspiracy to Possess with Intent to Distribute	03/16/04

Count
1ss

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/30/06
Date of Imposition of Judgment

/s/ William G. Young
Signature of Judge

The Honorable William G. Young, U.S. District Judge
Name and Title of Judge

03/31/06
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.
04-10098-WGY

* *

UNITED STATES OF AMERICA *

v. * SENTENCING
* EXCERPT

WILLIAM TEJEDA *

* *

BEFORE: The Honorable William G. Young,
District Judge

1 Courthouse Way
Boston, Massachusetts
March 30, 2006

THE COURT: Very well.

Mr. William Tejeda, pursuant to the provisions of 18 United States Code, Section 3553, the information from the United States Attorney, the probation office and your attorney, this Court sentences you to 20 years in the custody of the United States Attorney General.

The Court credits you toward that sentence with 359 days already served in custody. The Court recommends that you serve that sentence at the correctional institution at Fort Dix, and failing that at the correctional institution at Otisville.

The Court recommends that you be transferred as soon as possible from Plymouth to the place of federal incarceration.

The Court imposes upon you a period of supervised release of five years. During the period of supervised release you shall comply with all the standard conditions. You shall submit to the collection of a DNA sample, prohibited from possessing a firearm or other dangerous weapon, and to participate in a program for substance abuse which program may include testing not to exceed 104 drug tests per year.

The Court imposes no fine on you due to your inability to pay a fine. The Court imposes the mandatory $100 special assessment.

Let me explain this sentence to you, sir. You are the supplier in a massive drug distribution ring of crack cocaine. Your able attorney argues on your behalf that there is no body in this case. Well, there may be no one identified as murdered, but there are bodies. Plenty of bodies. Because crack cocaine is one of the most addictive, dangerous substances known to our society. There are mothers who sell themselves because they're addicted to crack. There are children who are paralyzed and stunted because their parents are addicted to crack. And it is for those reasons that the congress of the United States has passed the penalties that it has. This is a just and appropriate sentence incurring both general and specific deterrence.

But your attorney is right to this extent. This sentence does not take into account rehabilitation. That's not quite right. It takes it into account, but it does not emphasize rehabilitation due to the nature of the offense.

And as has been the case in other circumstances, your family circumstances, while tragic, are caused by you, sir. You were not vulnerable. No one was twisting your arm. This is a just and a fair sentence. He's committed to the custody of the marshals.

You have a right to appeal, Mr. Tejeda, and should you appeal and should your appeal be successful in whole

or in part and you come on for resentencing, resentencing will be before another judge.

I don't know that this is necessary in this case, but I'm now following the practice, should you appeal, I want the order for transcript prior to the notice of appeal, Mr. Apfel, to make the transcript production smooth and prompt.

Do you understand?

MR. APFEL: I understand.

THE COURT: That's the order of the Court. We have a civil matter to deal with in the lobby and we will do that.

We'll recess. And the students may come back.

THE CLERK: All rise. Court is in recess.

(Whereupon the matter concluded.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.
04-10098-WGY

* *

UNITED STATES OF AMERICA *

v. * SENTENCING
* EXCERPT

CHRISTOPHER CUSTER *

* *

BEFORE: The Honorable William G. Young,
District Judge

1 Courthouse Way
Boston, Massachusetts

March 28, 2006

THE COURT: Mr. Christopher Custer, in consideration of the offense of which you stand convicted, the information from the United States Attorney, your attorney, the probation officer and yourself, this Court sentences you to 25 years in the custody of the United States Attorney General. The Court thereafter imposes upon you a term of five years' supervised release. The Court imposes no fine due to your inability to pay a fine. The Court imposes a $100 special assessment as required by the law.

The special conditions of your supervised release are that you submit to the collection of a DNA sample as directed by the probation office. You're to participate in a program for substance abuse and mental health treatment, which program may include testing not to exceed 104 drug tests per year. You're to contribute to the extent of your ability to the costs of that program. You're not to consume any alcohol or alcoholic beverages during the period of your supervised release.

Let me explain this sentence to you. You were at the very center of a significant drug trafficking operation in crack cocaine, one of the most addictive and harmful substances known to our society. What's more, you involved your girlfriend in this illegal conduct -- illegal activity significantly impairing the chances that you may

have -- that she might otherwise have had.

You have a lengthy criminal record. You have in the courts of the Commonwealth been given chance after chance. This Court imposes this sentence consistent with, first, what I believe to be the congressional objectives set forth in Section 3553(a) and as the First Circuit requires giving primary emphasis to the sentencing guidelines as set forth by the sentencing commission.

Nevertheless, to go 27 years is greater than necessary to accomplish the objective set forth in 3553(a). This 25-year term of incarceration, the first long-term custodial sentence ever imposed upon you, Mr. Custer, is an adequate punishment, a suitable specific deterrent. Any longer term of incarceration is not required to protect society.

Having said all that, the omission of any reference to rehabilitation is, sadly, intentional. A sentence of 25 years on an individual of your age, sir, holds out no particular prospect of rehabilitation. And we kid ourselves if we think that sentences this long as advised by congress and the sentencing commission will in fact rehabilitate people who are sent away for such a period.

You will have credit toward the service of that sentence for the period from March 16th to April 22nd, 2004, and from May 6th, 2005 to the present.

You have the right to appeal from any findings or rulings this Court has made against you. Should you appeal and should your appeal be successful in whole or in part any resentence will be accomplished before another judge.

Now, both you, Mr. Custer, and the government, because I have deviated under the provisions of the Booker case, have the right to appeal this sentence. If either side appeals, I want you to order the transcript before filing the notice of appeal. I will immediately allow it. That's to make things move along quickly. If you appeal and I lose jurisdiction, it will be about a month before the Court of Appeals allows the preparation of the transcript.

Do you understand, Ms. Poswistilo?

MS. POSWISTILO: Yes, your Honor.

THE COURT: Do you understand, Mr. Smith?

MR. SMITH: Yes, your Honor.

THE COURT: That's the direction.

He's remanded to the custody of the marshals. We'll recess.

THE CLERK: All rise. Court is in recess.

(Whereupon the matter concluded.)

No. 07-12

In the Supreme Court of the United States

WILLIAM TEJEDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was required to apply a rebuttable presumption that a "throat-slitting gesture" witnessed by two members of petitioner's jury was prejudicial.

2. Whether petitioner's within-Guidelines sentence was reasonable.

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In the Supreme Court of the United States

No. 07-12

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 481 F.3d 44.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2007. The petition for a writ of certiorari was filed on July 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to possess 50 or more grams of cocaine base with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 240 months of impris-

onment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner was the New York City supplier of cocaine base to a drug distribution ring that operated out of Cape Cod, Massachusetts. Every 10 to 14 days, members of the ring would drive to New York and obtain approximately 500 grams of cocaine base from petitioner. Several of these transactions took place in a red van. Pet. App. 3a-5a; Gov't C.A. Br. 3-7.

2. On the third day of trial, a law enforcement officer testified that he had seen some of the courtroom spectators in the red van while it was parked outside the courthouse. During a break, a juror reported to the court that she and another juror had seen one of the identified spectators make "a throat-slitting gesture" on the previous day of trial. Pet. App. 5a. The court raised the issue with the parties outside the jury's presence, and defense counsel informed the court that the person who made the gesture—whom the court described as an "obviously frail appearing, old man"—was petitioner's grandfather. *Id.* at 5a-6a. The court barred the man and his wife from the courtroom and ordered them to stay away from the courthouse. *Id.* at 5a.

Petitioner moved for a mistrial. The court proposed questioning the two jurors who had seen the gesture, but defense counsel expressed concern that doing so would only highlight the issue. When trial resumed, the court informed the jury that "[a] matter" had been raised and that the court had "taken care of it completely." Pet. App. 6a. The court stated: "Put it out of your mind. It has nothing to do with this case." *Ibid.* The court did not inform the jury that the man who made the gesture was petitioner's grandfather, and it admonished the jurors not to discuss the case amongst themselves. *Ibid.*

Petitioner later submitted a written mistrial motion. On the fourth day of trial, the court denied that motion, but granted the parties' joint request that it question separately the two jurors who had seen the gesture. Pet. App. 6a. Both jurors acknowledged discussing the matter with the other jurors before being instructed not to do so by the court. 5/09/05 Tr. 75, 83-84. The jurors testified that they would be able to remain impartial notwithstanding the incident, *id.* at 77, 85, and the court specifically found that the juror who made the initial report had been forthcoming, *id.* at 79. The court again denied the motion for a mistrial. Pet. App. 7a.

On the fifth day of trial, and at petitioner's request, the court separately questioned each of the remaining jurors. None had seen the gesture, though all but one reported hearing about it. All of the jurors testified that the only discussions about the incident took place before the initial report to the court, and that they could be fair and impartial despite the incident. Pet. App. 7a. Although some of the jurors expressed concerns about the gesture, "no juror expressed fear for his or her safety" after being informed about the corrective measures taken by the court. *Id.* at 8a. The court again denied petitioner's motion for a mistrial. The jury found petitioner guilty, and the district court denied petitioner's post-verdict motion for a new trial. *Ibid.*

At sentencing, the district court determined that petitioner's advisory Guidelines range was 235-293 months of imprisonment. 3/30/06 Tr. 6. The court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. *Id.* at 27. The court found that petitioner was "the supplier in a massive drug distribution ring of crack cocaine," which it described as "one of the most addictive dangerous sub-

stances known to our society." *Id.* at 28. The court determined that 20 years of imprisonment was "a just and appropriate sentence incurring both general and specific deterrence." *Ibid.* The court also stated that its sentence took rehabilitation "into account, but it does not emphasize rehabilitation due to the nature of the offense." *Ibid.* The court described petitioner's family circumstances as "tragic," but stated that those circumstances had been "caused by" petitioner's own conduct. *Ibid.*; see *id.* at 28-29 ("You were not vulnerable. No one was twisting your arm.").

3. The court of appeals affirmed. Pet. App. 1a-27a. With respect to the throat-slitting gesture, the court rejected petitioner's claim, raised for the first time on appeal (*id.* at 10a & n.6), that he was entitled to a presumption of prejudice under *Remmer* v. *United States*, 347 U.S. 227 (1954). Although it acknowledged "an ongoing debate in the circuits about the limits on and the ongoing vitality of the presumption of prejudice rule announced in *Remmer*," the First Circuit stated that its previous decisions had "already rejected [petitioner's] argument that the *Remmer* presumption applies to all claims of juror bias resulting from extraneous contacts." Pet. App. 10a-11a. The court of appeals determined that no presumption was appropriate here because "the gesture did not come from the prosecution and was not an effort to put evidence in front of the jury." *Id.* at 12a. The court also stated that there "are different considerations at play when a defendant attempts to vacate a conviction, in the face of overwhelming evidence of guilt, on the basis that someone associated with the defense made an improper gesture to the jury," because "we would not want to create an incentive for such gesturing." *Ibid.*

Having concluded that no presumption of prejudice was warranted, the court of appeals further held that the district court had not abused its discretion in handling the incident. The district court had "followed every step in the procedure" set forth in the court of appeals' previous decisions, and there was "no realistic objection to the process it used." Pet. App. 13a. The court had taken "immediate remedial action" by barring the man and his wife from the courtroom and instructing the jurors not to be concerned about or discuss the incident. *Id.* at 15a. Several jurors later testified that the jury followed those instructions, and "if jurors say they have followed instructions, their statements are credited." *Ibid.* Finally, the district court questioned all of the jurors "and concluded that each could be impartial." *Ibid.* The court of appeals acknowledged that there are "extreme cases in which jurors' responses will not be credited," but "disagree[d]" with petitioner's assertion that this was such a case. *Id.* at 16a. The district court, it stated, had "responded sensitively and correctly" to the incident. *Ibid.*

The court of appeals also held that the district court's 240-month sentence was reasonable. Pet. App. 26a-27a. The court "disagree[d] with [petitioner's] assertion that the district court did not consider his particular potential for rehabilitation," stating that it understood the district court to have said "that given the particulars of [*petitioner's*] offense, not drug offenses *in general*, the court did not think rehabilitation particularly likely." *Id.* at 27a n.16.

ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals' ruling that a presumption of prejudice did not

apply to the jury's exposure to the throat-slitting gesture conflicts with decisions from other courts of appeals. This case does not present a suitable vehicle to resolve any disagreement among the circuits with respect to whether a jury's exposure to such extraneous influences must be presumed to be prejudicial. Petitioner did not urge the district court to apply a presumption of prejudice in this case, and the outcome would be the same regardless of the circuit in which it arose, because any presumption would have been rebutted on this record. Accordingly, this Court's review is not warranted.

In *Remmer* v. *United States*, 347 U.S. 227 (1954), a defendant who had been convicted on criminal charges sought a new trial after learning that, during trial, a third party had attempted to bribe a juror and the district court had initiated an FBI inquiry into the matter. *Id.* at 228. This Court did not hold that a new trial was automatically required because of that external influence on the juror. Rather, the Court remanded the case to the district court "with directions to hold a hearing to determine whether the incident complained of was harmful to the [defendant]." *Id.* at 230. In so holding the Court observed that, "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Id.* at 229. The Court added that the presumption, although "not conclusive," places the burden on the government "to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Ibid.*

More recently, this Court has declined to apply a presumption of prejudice to other claims of jury irregularities. In *Smith* v. *Phillips*, 455 U.S. 209 (1982), the Court held that the proper remedy in a case in which a juror had applied for a position in the prosecutor's office during trial was "a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215; see *id.* at 217 ("due process does not require a new trial every time a juror has been placed in a potentially compromising situation"). In refusing to presume prejudice, the Court explained that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Ibid.*

Likewise, in *United States* v. *Olano*, 507 U.S. 725 (1993), the Court, on plain-error review, declined to apply any presumption of prejudice when alternate jurors were improperly present during jury deliberations. *Id.* at 737-740. The Court held that no new trial was required in light of a post-verdict inquiry that showed that the alternate jurors did not participate in the deliberations. *Id.* at 740-741.[1]

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[1] The Court's limitation of the *Remmer* presumption, and its refusal to apply it where the circumstances do not warrant, is consistent with the Court's limitation of the presumption of vindictiveness announced in *North Carolina* v. *Pearce*, 358 U.S. 711 (1969). "While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have * * * limited its application, like that of other judicially created means of effectuating rights secured by the Constitution, to circumstances where its objectives are thought most efficaciously served." *Alabama* v. *Smith*, 490 U.S. 794, 799 (1989) (internal quotation marks, brackets, and citations omitted) (refusing to apply a presumption where vindictiveness was not more likely than not); see also *Texas* v. *McCullough*, 475 U.S. 134, 137-140 (1986); *United States* v. *Goodwin*, 457 U.S. 368 (1986). As in the context of the Court's jury "intrusion" jurisprudence, *Olano*, 507 U.S. at 738, in the

The courts of appeals have taken somewhat divergent positions on whether, or to what extent, *Remmer*'s presumption of prejudice survives *Phillips* and *Olano*. The First Circuit, in which this case arose, has held that "the presumption is applicable only where there is an egregious tampering or third party communication which directly injects itself into the jury process." *United States* v. *Boylan*, 898 F.2d 230, 261, cert. denied, 498 U.S. 849 (1990); see *United States* v. *Bradshaw*, 281 F.3d 278, 287-298 (1st Cir.) (Pet. 12), cert. denied, 537 U.S. 1049 (2002). No such conduct was involved in this case. As the court of appeals explained, "the gesture did not come from the prosecution and [it] was not an effort to put evidence before the jury." Pet. App. 12a. In addition, the court of appeals correctly stated that "different considerations [are] at play when a defendant attempts to vacate a conviction, in the face of overwhelming evidence of guilt, on the basis that someone associated with the defense made an improper gesture to the jury." *Ibid.*

The First Circuit's position that a presumption of prejudice does not apply to every extraneous influence on a jury is consistent with the positions of most other circuits that have considered the issue since *Phillips* and *Olano*. One circuit has held that the presumption no longer exists. *United States* v. *Pennell*, 737 F.2d 521, 532-533 (6th Cir. 1984) (Pet. 13), cert. denied, 469 U.S. 1158 (1985); see *United States* v. *Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988). Two other circuits have expressly reserved the question. *King* v. *Bowersox*, 291 F.3d 539, 541 (8th Cir.), cert. denied, 537 U.S. 1093 (2002); *United*

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absence of a presumption, it remains open to a defendant to establish actual prejudice, *id.* at 741. See *Smith*, 490 U.S. at 831 ("actual vindictiveness").

States v. *Ronda*, 455 F.3d 1273, 1299 n.36 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327, and 127 S. Ct. 1338 (2007).[2]

Other circuits agree with the First Circuit that whether a presumption of prejudice should be applied depends on the circumstances. Two circuits have instructed trial courts not to presume prejudice automatically, but instead to inquire "whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness." *United States* v. *Williams-Davis*, 90 F.3d 490, 497 (D.C. Cir. 1996) (Pet. 13) (citation omitted), cert. denied, 519 U.S. 1128, and 519 U.S. 1129 (1997) (Pet. 12); see *United States* v. *Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (Pet. 12) (quoting *Williams-Davis*, 90 F.3d at 497). Another circuit has confined the presumption to cases similar to *Remmer* itself, *i.e.*,

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[2] In *McNair* v. *Campbell*, 416 F.3d 1291 (2005) (Pet. 11), cert. denied, 547 U.S. 1073 (2006), the Eleventh Circuit applied a presumption of prejudice when a member of a jury had "brought a Bible into the jury room during deliberations, read aloud from it, and led the other jurors in prayer." *Id.* at 1301; see *id.* at 1307. In *Ronda*, which was decided after *McNair*, the Eleventh Circuit acknowledged a possible conflict between decisions like *McNair* and two other decisions that "stated that prejudice is not presumed even when jurors considered extrinsic evidence," but declined to resolve the tension because "[e]ven granting Appellants the presumption of prejudice, we conclude that the government has sufficiently rebutted that presumption." *Ronda*, 455 F.3d at 1299 n.36 (citing *United States* v. *Rowe*, 906 F.2d 654, 656-657 (11th Cir. 1990), and *United States* v. *De La Vega*, 913 F.2d 861, 870 (11th Cir. 1990), cert. denied, 500 U.S. 916 (1991)). Any intra-circuit conflict, however, would be a matter for the Eleventh Circuit to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

those that involve direct jury tampering or other serious intrusion into the jury process. *United States* v. *Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (stating that the presumption applies "when the extraneous information is of a considerably serious nature," such as "when a juror is directly contacted by third-parties"); see *United States* v. *Console*, 13 F.3d 641, 666 (3d Cir. 1993) (Pet. 11) (applying presumption to direct communication between third party and juror during deliberations), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994). Although the Eighth Circuit has more recently reserved the question of whether the *Remmer* presumption survives this Court's decisions in *Phillips* and *Olano*, see *King*, 291 F.3d at 541, it has held that the presumption does not apply in any event unless an "extrinsic contact relates to factual evidence not developed at trial." *United States* v. *Hall*, 85 F.3d 367, 371 (1996) (internal quotation marks and citation omitted). The Fourth Circuit has stated that "the presumption is not one to be casually invoked" and does not apply "every time a third party communication reaches the ears of a juror during trial." *Stockton* v *Virginia*, 852 F.2d 740, 744-745 (1988), cert. denied, 489 U.S. 1071 (1989).[3]

Other circuits, however, read *Remmer* to require a presumption of prejudice whenever a jury is exposed to any external information. The Second Circuit presumes that "any extra-record information of which a juror becomes aware" is prejudicial. *United States* v. *Greer*, 285 F.3d 158, 173 (2002) (Pet. 11). The Ninth Circuit applies a presumption of prejudice "[w]hen there has been any

[3] In *United States* v. *Lentz*, 383 F.3d 191, 219 (2004) (Pet. 11), cert. denied, 544 U.S. 979 (2005), the Fourth Circuit applied a presumption of prejudice when a day planner that had not been admitted into evidence was left in the jury room during deliberations.

improper contact with a juror or any form of jury tampering—whether direct or indirect." *United States* v. *Simtob*, 485 F.3d 1058, 1064 (2007) (Pet. 11). And the Tenth Circuit applies the presumption "[w]hen members of a jury are exposed to extraneous information about a matter pending before the jury[.]" *United States* v. *Scull*, 321 F.3d 1270, 1280, cert. denied, 540 U.S. 864 (2003).

This is not an appropriate case in which to resolve any inter-circuit tension concerning the continuing existence or scope of the *Remmer* presumption. Petitioner did not ask the district court to apply a presumption of prejudice, and the district court did not address whether any such presumption should be applied in the circumstances of this case. Thus, although the issue was raised and addressed in the court of appeals, Pet. App. 10a & n.6, it is governed by the plain-error rule, Fed. R. Crim. P. 52(b), under which petitioner cannot prevail unless he can establish "obvious" error that affects his substantial rights and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 734-737. In view of the narrowing of the contexts in which the *Remmer* presumption applies, particularly in the First Circuit, the district court did not commit obvious error in failing to apply a presumption of prejudice. Moreover, the "overwhelming" character of the evidence of guilt and the fact that the gesture was made by "someone associated with the defense," Pet. App. 12a, would surely deserve serious weight before a court could exercise its discretion to apply a presumption and overturn a verdict of a jury whose members affirmed their impartiality and who were protected by curative measures. See *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997) (error in omitting element of offense from

jury instructions did not seriously affect judicial integrity, and thus did not warrant plain error relief, when the evidence regarding the issue was "overwhelming" and "essentially uncontroverted").

In addition, the facts were not developed to permit complete assessment of petitioner's claim that this case involves jury "tampering" (Pet. 16), because "two jurors saw a man make a physically threatening throat-slitting gesture toward them." Pet. 15; see Pet. 3 (asserting that the gesture was made "toward the jury"). Neither of the two jurors who actually saw the gesture testified that she thought it was directed at her or the jury as a whole, 5/09/05 Tr. 72-87, and the district court stated that it was "not at all prepared to conclude that this was a gesture made to the jurors," 7/20/05 Tr. 6.[4]

In any event, petitioner cannot show that this case would be resolved differently if a presumption of prejudice were applied. As this Court noted in *Olano*, "a presumption of prejudice * * * does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" 507 U.S. at 739. Here, upon learning of the gesture, the district court banished the man in question from the courtroom, delivered several emphatic curative instructions, and conducted a probing inquiry of each juror. See *Phillips*, 455 U.S. at 215 ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). Having inquired of all of the jurors and witnessed their demeanor, the district court was entitled to accept the jurors' assurances of impartiality.

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[4] In addition, although petitioner asserts (Pet. 6-7, 15) that six jurors expressed "fears and concerns" (Pet. 6), the court of appeals stated that "no juror expressed fear for his or her safety" after being informed of the corrective measures taken by the district court. Pet. App. 8a.

See *id.* at 217 n.7 (rejecting claim that juror testimony in *Remmer*-type hearings is "inherently suspect," because "surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter") (quoting *Dennis* v. *United States*, 339 U.S. 162, 171 (1950)). Accordingly, even if a presumption of prejudice were applied in this case, petitioner would not ultimately be entitled to any relief.

2. Petitioner also contends (Pet. 18-22) that his 240-month sentence, which was within the advisory Guidelines range, was unreasonable under *United States* v. *Booker*, 543 U.S. 220 (2005), because the district court failed to consider his amenability to rehabilitation. The court of appeals rejected petitioner's interpretation of the district court's sentencing order, viewing the court as having stated "that given the particulars of [*petitioner's*] offense," rehabilitation was "not * * * particularly likely." Pet. App. 27a n.16. Nor does petitioner raise any claim that implicates this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007). Although petitioner's sentence is within the advisory Guidelines range, neither the district court nor the court of appeals treated that fact as dispositive and both concluded that petitioner's sentence was reasonable. Pet. App. 27a; 3/30/06 Tr. 28-29. Finally, although petitioner's offense involved cocaine base, petitioner raises no issue concerning the quantity-based disparity between crack and powder cocaine and thus cannot claim that this case is likely to be affected by this Court's decision in *Kimbrough* v. *United States*, No. 06-6330 (argued Oct. 2, 2007). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2007